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116 LRP 21359

**Memorandum to State Directors of
Special Education, Preschool/619 State
Coordinators, Head Start Directors
Office of Special Education Programs**

OSEP 16-07

April 29, 2016

Related Index Numbers

373. PRESCHOOL PROGRAMS

70. CHILD FIND

185.057 Response to Intervention

433. RESPONSE TO INTERVENTION (RTI)

185.050 Referral

Judge / Administrative Officer

Ruth E. Ryder, Acting Director

Case Summary

Stating that it is "critical" for educational agencies to timely identify preschoolers with disabilities who may be in need of special education, OSEP warned districts not to gum up the works by requiring a preschool program to first provide RTI data on a child. OSEP stated that districts must not use the program's failure to implement the RTI process as a basis for denying or delaying an evaluation. OSEP stated that it supports educational agencies' use of RTI strategies to help identify and distinguish academically and behaviorally struggling children who require an IDEA referral from those who simply need intense short-term interventions. However, a district that receives a referral from a preschool program, OSEP explained, must initiate the child's evaluation as required by the time lines mandated under the IDEA (or state law, if applicable), regardless of whether the child ever engaged in the RTI process. An LEA may not extend the applicable time line or reject the referral solely on the basis that the preschool program must first monitor the child's developmental progress using RTI. "It would be inconsistent with the evaluation provisions at 34 CFR §§ 300.301 through 300.311 for an LEA to reject a

referral and delay provision of an initial evaluation on the basis that a preschool program has not implemented an RTI process with a child and reported the results of that process to the LEA," OSEP Acting Director Ruth E. Ryder wrote. OSEP added that a parent who believes that a district has declined to evaluate until the preschool program implements RTI may seek redress through either due process or state complaint procedures.

Full Text

Appearances:

Memorandum

TO: State Directors of Special Education,
Preschool/619 State Coordinators, Head Start
Directors

FROM: Ruth E. Ryder, Acting Director, Office
of Special Education Programs

SUBJECT: A Response to Intervention Process
Cannot Be Used to Delay-Deny an Evaluation for
Preschool Special Education Services under the
Individuals with Disabilities Education Act

It has been brought to the attention of the Office of Special Education Programs (OSEP) that some local educational agencies (LEAs) may be using Response to Intervention (RTI) strategies to delay or deny a timely initial evaluation for preschool children suspected of having a disability.

The requirements related to child find in Part B of the Individuals with Disabilities Education Act (IDEA) require that each State and its LEAs have in effect policies and procedures to ensure that all children with disabilities residing in the State who need special education and related services, regardless of the severity of their disability, are identified, located, and evaluated. 34 CFR §§ 300.111 and 300.201. The IDEA child find requirements permit referrals from any source, including private and public preschools (e.g., Head Start) and community-based child care programs (hereinafter "preschool programs"), that suspects a child may be eligible for special education and related services. It is

critical that this identification occurs in a timely manner and that no procedures or practices result in delaying or denying this identification. States and LEAs have an obligation to ensure that evaluations of all children suspected of having a disability, including evaluation of 3-, 4-, or 5-year-old children enrolled in preschool programs, are not delayed or denied because of implementation of an RTI strategy.¹

A multi-tier system of supports, often referred to as RTI, means a comprehensive continuum of evidence-based, systemic practices to support a rapid response to a child's needs, with regular observation to facilitate data based instructional decision-making. OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many LEAs and preschool programs have implemented successful RTI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation; and those children who simply need intense short-term interventions are provided those interventions. The IDEA, however, does not require, or encourage, an LEA or preschool program to use an RTI approach prior to a referral for evaluation or as part of determining whether a 3-, 4- or 5-year old is eligible for special education and related services.

Once an LEA receives a referral from a preschool program, the LEA must initiate the evaluation process to determine if the child is a child with a disability. 34 CFR § 300.301(b). An LEA may not decline a child find referral from a preschool program until the program monitors the child's developmental progress using RTI procedures. If the LEA proposes to conduct an initial evaluation to determine if the child qualifies as a child with a disability under 34 CFR § 300.8, the LEA must provide notice under 34 CFR §§ 300.503 and 300.504 and obtain informed parental consent, consistent with 34 CFR § 300.9, before conducting the evaluation.

Although IDEA and its implementing

regulations do not prescribe a specific timeframe from referral for evaluation to parental consent, it has been the Department's longstanding policy that the LEA must seek parental consent within a reasonable period of time after the referral for evaluation, if the LEA agrees that an initial evaluation is needed. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, 71 FR 46540, 46637 (August 14, 2006). An LEA must conduct the initial evaluation within 60 days of receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. 34 CFR § 300.301(c). If, however, the LEA does not suspect that the child has a disability, and denies the request for an initial evaluation, the LEA must provide written notice to parents explaining why the public agency refuses to conduct an initial evaluation and the information that was used as the basis for this decision. 34 CFR § 300.503(a) and (b). Therefore, it would be inconsistent with the evaluation provisions at 34 CFR §§ 300.301 through 300.311 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a preschool program has not implemented an RTI process with a child and reported the results of that process to the LEA. If a parent believes a needed evaluation is being delayed based on an LEA's refusal to conduct an initial evaluation until the preschool program implements an RTI approach with the child, the parent may file a due process complaint under 34 CFR § 300.507 or a State complaint under 34 CFR § 300.153.

We hope this information is helpful in clarifying the relationship between RTI and evaluations pursuant to the IDEA. Please examine the procedures and practices in your State and LEAs to ensure that the use of RTI is not delaying or denying timely initial evaluations to preschool children suspected of having a disability.

Based on section 607(e) of the IDEA, we are informing you that this memorandum is provided as informal guidance and is not legally binding, but

represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have further questions, please do not hesitate to contact Lucille Sleger at Lucille.Sleger@ed.gov or Laura Duos at Laura.Duos@ed.gov.

¹See OSEP Memorandum 11-07, A Response to Intervention Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act, issued on January 21, 2011 and OSEP *Letter to Brekken* (June 2, 2010).

Regulations Cited

34 CFR 300.111
34 CFR 300.201
34 CFR 300.301(b)
34 CFR 300.503
34 CFR 300.504
34 CFR 300.9
34 CFR 300.503(a)
34 CFR 300.503(b)
34 CFR 300.301(c)
34 CFR 300.153